

**DA 98-326**

In the Matter of

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. Our initial analysis shows that while petitioner's proposal would provide a first local aural service to Chittenango, it would be accomplished at the expense of DeRuyter losing its sole local aural broadcast service, a result which the Commission generally prohibits. We recognize that Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990), states that a waiver of the prohibition on the removal of a community's sole local

broadcast service will be considered in the rare circumstances where removal of a local service might serve the public interest, such as where the new allotment would provide a first reception service to a significantly sized population. Id., 5 FCC Rcd 7096. However, the Commission went on to state that the public interest is not served by removing a community's sole local transmission service only to provide such a service to another community. The reallocation proposal must serve the Commission's policies and priorities.<sup>1</sup> See Llano and Marble Falls, Texas, 12 FCC Rcd 6809 (1997), recon. pending. In addition, the Commission stated that "the public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both." Id., 5 FCC Rcd 7097. In this case, petitioner proposes to allot Channel 286B to Chittenango based solely on the new community's larger population. However, as stated by the petitioner, the allotment of Channel 286B to Chittenango requires no change in Station WVOA's transmitter site or facilities since the community lies within the station's 70 dBu city-grade signal. Thus, no new area and population will receive service if Station WVOA's license is modified to specify Chittenango instead of DeRuyter. Therefore, in order to evaluate this proposal, we request that petitioner provide any other public interest benefit which would justify granting a waiver of the general prohibition against the removal of a community's sole local broadcast service.

#### Technical Summary

4. Channel 286B can be allotted to Chittenango in compliance with the Commission's minimum distance separation requirements, at Station WVOA's presently authorized transmitter site, which is 29.2 kilometers (18.2 miles) south of Chittenango.<sup>2</sup> This site will maintain the present short-spacing to Stations WBBS, Channel 284B, Fulton, NY, WNGZ, Channel 285A, Montour Falls, NY, WILQ, Channel 286B, Williamsport, PA, WGKR, Channel 287A, Grand Gorge, NY, and WKPQ, Channel 287B, Hornell, NY. We recognize that Section 1.420(i) of the Commission's Rules does not specifically address grandfathered short-spacing situations such as this. However, the Commission has previously found that we would consider waiving strict application of Section 73.207 in limited circumstances, provided that no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased. See Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307(1992). In this regard, we request specific comment concerning whether waiver of Section 73.207 would be appropriate in this instance. Chittenango is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Therefore, concurrence in the allotment by the Canadian Government is required.

5. We believe petitioner's proposal warrants consideration since the allotment of Channel

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<sup>1</sup> The FM priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. The second and third priorities are accorded co-equal weight.

<sup>2</sup> The coordinates for Channel 286B at Chittenango are 42-46-58 North Latitude and 75-50-28 West Longitude.

286B to Chittenango could provide the community with its first local aural service. In compliance with Section 1.420(i), we also propose to modify Station WVOA's license to specify Chittenango as its community of license without affording other interested parties an opportunity to apply for the channel. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Chittenango, New York	--	286B
DeRuyter, New York	286B	--

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before April 20, 1998, and reply comments on or before May 5, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Oyster  
108 Oyster Lane  
Castleton, VA 22716-9720  
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 115, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other

parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

Attachment: Appendix

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.